

REMARKS

Claims 79-82 have been canceled without prejudice or disclaimer as drawn to the non-elected invention. Claim 58 is amended to recite the transitional phrase "comprises a nucleic acid sequence." Claims 51-78 are pending.

Applicants thank the Examiner for the indication of allowable subject matter.

It is respectfully submitted that the present amendment presents no new issues or new matter and places this case in condition for allowance. Reconsideration of the application in view of the above amendments and the following remarks is requested.

I. The Rejection of Claims 51, 52, 59 and 61-78 under 35 U.S.C. 112 (Written Description)

Claims 51, 52, 59 and 61-78 are rejected under 35 U.S.C. 112, as allegedly lack written description support. The Examiner alleges that:

The specification sets forth SEQ ID NO:48. However, the instant claims are drawn to a nucleic acid sequence that hybridizes to SEQ ID NO:48 or its complementary strand, or functional nucleic acids with 90% identity thereto, or a functional fragment thereof, or vector, cells, hosts or methods which make use thereof. However, neither the specification nor the prior art teaches which region or regions of the transcriptional activator polypeptide are required for function, and there are not theories or formulate in the prior art that would have permitted one of skill to have known *a priori* which embodiments found within the structural limitations of the claims would have retained the specified activity.

This rejection is respectfully traversed. Under 35 U.S.C. § 112, "[t]he specification shall contain a written description of the invention...." The purpose of the written description requirement is to "insure [] that subject matter presented in the form of a claim subsequent to the filing date of the application was sufficiently disclosed at the time of filing so that the *prima facie* date of invention can fairly be held to be the filing date of the application." *In re Smith and Hubin*, 178 U.S.P.Q. 620, 623 (C.C.P.A. 1973). It is well settled "[t]he test for determining compliance with the written description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter...." *In re Kaslow*, 217 USPQ 1089, 1096 (Fed. Cir. 1983).

Applicants respectfully submit that the specification provides adequate written description support for the claimed invention. The Office action indicates that the claims encompass sequences which "hybridize" to SEQ ID NO:48 or its complementary strand, as well as functional fragments. However, the claims do not merely encompass sequences that simply hybridize to

SEQ ID NO:48 and complementary sequences thereof under all conditions, but rather the claims clearly specify that the hybridization must be under high stringency hybridization conditions. An artisan would have clearly concluded that applicants were in possession of not only SEQ ID NO:48, but also those sequences which hybridize under high stringency condition with SEQ ID NO:48 and its complementary strand. In particular, sequences that hybridize under high stringency hybridization condition encompass nucleic acid sequences which encode polypeptides having transcriptional activation activity which have a high structural and functional similarity to the polypeptide encoded by SEQ ID NO:48, e.g., nucleic acid sequences which encoded polypeptides having conservative amino acid substitutions, as described in the specification on page 28, lines 4-18.

The Office action indicated that the specification does not provide theories or formulate what would have permitted one of skill in the art to have known a priori which embodiment within the structural limitations of the claims would have retained the specific activity. However, it is respectfully submitted that the recitation high stringency hybridization conditions provides this very information. In particular, an artisan would expect that only highly related nucleic acid sequences encoding polypeptides which have a very similar structure and function would hybridize under high stringency hybridization conditions. In this regard, an artisan would have concluded that applicants were in possession of not only SEQ ID NO:48 and its complementary strand, but also highly related sequences which are encompassed by the high stringency hybridization conditions recited in the claims.

With respect to the claim language "a nucleic acid sequence that encodes a fragment of SEQ ID NO: 48, wherein the fragment has transcriptional activation activity," it is respectfully submitted that the specification also provides sufficient written description support for this subject matter. In particular, the specification describes SEQ ID NO:48. An artisan would have also concluded that Applicants were in possession of fragments of SEQ ID NO:48 which have transcription activation activity. Such sequences are simply subsets of SEQ ID NO:48 that have transcription activation activity, which can be routinely produced and assayed. Thus, an artisan would clearly have concluded that Applicants were in possession of fragments of SEQ ID NO:48 which have transcription activation activity because the possession of SEQ ID NO:48 itself provides possession of such fragments given that the techniques and assay for producing such fragments were well within the possession of the artisan.

For the foregoing reasons, Applicants submit that the claims overcome this rejection under 35 U.S.C. 112. Applicants respectfully request reconsideration and withdrawal of the rejection.

II. The Rejection of Claims 58 under 35 U.S.C. 112 (Indefiniteness)

Claim 58 is rejected under 35 U.S.C. 112 as indefinite. The Office action states that a term such as "consists" appears to be missing from claim 58, end of the first line.

Applicants have amended claim 58 to include the term "comprises a nucleic acid sequence." For the foregoing reasons, Applicants submit that the claims overcome this rejection under 35 U.S.C. 112. Applicants respectfully request reconsideration and withdrawal of the rejection.

III. Conclusion

In view of the above, it is respectfully submitted that all claims are in condition for allowance. Early action to that end is respectfully requested. The Examiner is hereby invited to contact the undersigned by telephone if there are any questions concerning this amendment or application.

Respectfully submitted,

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